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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 572

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Creek Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled cause on June 2, 1941 (R. 18).

Opinion Below.

The opinion of the Court of Claims is not as yet reported (R. 6-11).

Jurisdiction.

The judgment of the Court of Claims on the second amended petition was entered on June 2, 1941 (R. 18), in which it referred to and adopted a decision of that court

dated January 6, 1941, on the amended petition (R. 6-11). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Judicial Code as amended, 28 U. S. C. A. 129).

Statutes Involved.

The special jurisdictional act approved May 24, 1924, c. 181, 43 Stat. 139, reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though

presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed by said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits."

Section 21 of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, 502-503, provides in part as follows:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes [Creek] eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, * * *."

* * * * * * *

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal law, shall alone constitute the several tribes which they represent."

The Original Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861, 862, 870, provided in part as follows:

"3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land--boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed."

* * * * * * *

"28. * * * All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, * * *."

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; * * *."

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

Question Presented.

Whether the United States, as guardian of petitioner, is liable to the Creek Nation for just compensation for lands lost because of the erroneous enrollment of persons on the Creek tribal rolls made by the administrative officers of respondent, in violation of the terms of the Curtis Act and the agreements between the United States and said Creek Nation; which erroneous enrollments and the lands allotted thereto were confirmed through the failure of the respondent to correct them after knowledge, or ample means of knowledge, of said errors, before said rolls became final and the rights of petitioner to said lands were prejudiced thereby.

Statement.

This case came before the lower court upon a general demurrer to the amended petition of petitioner, the plaintiff below (R. 1-5). On January 6, 1941, the lower court rendered a decision on the questions involved and dismissed the amended petition (R. 6-11). On February 15, 1941, with leave of court first obtained, plaintiff below filed a second amended petition, to which respondent, defendant below, filed a general demurrer (R. 11-18). On June 2, 1941, the lower court entered its judgment thereon dismissing the second amended petition, and adopting its former decision on demurrer to the amended petition (R. 18). The correctness of this decision is now in question.

The second amended petition alleges as follows:

That when the Curtis Act was passed on June 28, 1898, c. 517, 30 Stat. 495, the plaintiff owned a large tract of land in fee simple located in what is now the State of Oklahoma (Par. II, R. 12); that before the passage of said Curtis Act the affairs of said Nation were governed by a tribal organization constituting an executive officer or Principal Chief, a legislature or National Council, a system of courts, and a constitution or code of written laws, whereby the affairs of said Nation and its citizens were administered (Par. III, R. 12).

That said lands were held in communal ownership, and the citizenship of said Nation was evidenced by town rolls kept by the duly constituted authorities of said Nation (Par. IV, R. 12).

That defendant, acting as trustee of plaintiff, desired to abolish the tribal government of plaintiff and to divide the communal property among the citizens of said Nation, and to wind up its affairs with a view of including said lands within a new State of the Union, passed what is known as the Curtis Act, approved June 28, 1898 (30 Stat. 495), under the terms of which the United States assumed full administrative control over the property and affairs of plaintiff; that defendant entered into two certain agreements known as the Original Creek Agreement (approved by Act of March 1, 1901, c. 676, 31 Stat. 861), and the Supplemental Creek Agreement (approved by Act of June 30, 1902, c. 1323, 32 Stat. 500), with plaintiff, whereby the United States agreed to act as trustee in dividing said property equally among those lawfully entitled to participate in its distribution (Par. V, R. 12-13).

That defendant under the terms of said Curtis Act and said Creek agreements was required to make "correct" rolls of the citizens of plaintiff, eliminating from the tribal rolls such names placed thereon by fraud or without au-

thority of law, and enrolling such only as may have lawful right thereto (Par. VII, R. 14).

That defendant required the tribal authorities of plaintiff to turn over to it the tribal rolls, and defendant directed its officers and agents to add to such tribal rolls persons found to be citizens of said Nation (Par. VIII, R. 14-15).

That defendant, contrary to the terms of the Curtis Act and said Creek Agreements, and in violation of the contract with plaintiff, added to said rolls of citizenship of plaintiff tribe, persons who were not lawfully entitled to share in the property of said Nation; that defendant made erroneous enrollments of citizens of plaintiff who were not living on April 1, 1899, made erroneous enrollments of persons who were non-citizens of plaintiff tribe, made duplicate and triplicate enrollments of one and the same persons, and enrolled children in violation of the laws governing such enrollments (Par. IX, R. 15).

That at an early date plaintiff learned that defendant's officers were thus adding to its citizenship rolls a large number of persons not entitled to citizenship in said Nation, and were making other errors in said enrollment that would prejudice the rights of plaintiff; that plaintiff endeavored to ascertain for the purpose of correcting said errors, the names thus erroneously added to said rolls; but that defendant denied plaintiff, its Principal Chief, National Attorney and the other officers of said Nation, the right to inspect said rolls; and that said rolls were kept secret, until they became final on March 4, 1907, as provided by Act of April 26, 1906, c. 1876, 34 Stat. 137 (Pars. X, XI, XII, R. 15-16).

That each of said erroneous enrollees received 160 acres of Creek National domain, and a large amount of plaintiff's funds, the exact amount of such acreage and funds so re-

ceived being unknown to plaintiff, but is within the knowledge of defendant (Par. XIII, R. 16).

That the officers and agents of defendant, having charge of said enrollment and allotment work were guilty of misconduct unbecoming to their duties as trustee of plaintiff, in carrying out the agreements with plaintiff; that the Chairman of the Dawes Commission, while actually engaged in said enrolling and allotting work, personally organized the Canadian Valley Trust Co., an organization chartered to deal in Indian lands within Indian Territory, and said Chairman became President of said company and a large stockholder therein; that the offices of said Dawes Commission were moved from the first floor of the building in which they were located to the second floor thereof, and the offices of said Canadian Valley Trust Company were moved in on the first floor of said building, and communication between the offices of said company and the Dawes Commission was maintained by means of a spiral stairway; that said Chairman was also an officer and stockholder in other such companies within the Indian Territory. That many of the other members and employees of said Dawes Commission were also officers and stockholders in the above company and other such companies within the Indian Territory.

That said companies were thus given a seeming official status, and said officers of defendant, although denying to the Creek Nation and other land companies access to said Creek rolls, yet used the information from said rolls, to further their own personal interests and the interests of said land companies in which they were officers and stockholders to the disadvantage of plaintiff, and in disregard of their duties under said Creek Agreements (Par. XIV, R. 13).

That defendant was trustee of plaintiff, and had knowledge, or means of knowledge, of the extent of said erroneous

enrollments, and although having ample means properly to correct them, yet did not do so, but instead permitted said erroneous enrollments to stand until they became irrevocable, thus confirming said wrongs to plaintiff and prejudicing the rights of plaintiff to its lands wrongfully allotted to said erroneous enrollees (Par. XV, R. 17).

That defendant thus appropriated said lands and that plaintiff is entitled to just compensation therefor (Par. XVI, R. 17-18).

The above facts are admitted by the demurrer, and petitioner contends that the facts thus alleged constitute a good cause of action against the United States under the terms of the special jurisdictional act.

Specification of Errors to be Urged.

The lower court erred in holding as its conclusions of law:

1. That the Creek Nation is not entitled to recover just compensation for its lands lost through the erroneous enrollment of persons on the Creek tribal rolls, made by the administrative officers of the United States in violation of the Curtis Act and the Creek Agreements, under the terms of the jurisdictional act of May 24, 1924.

2. That the *Wildcat* case is decisive of the question now before us.

3. That the petitioner is not entitled to its day in court.

4. That the Curtis Act and the Creek Agreements did not require the United States to make correct rolls of the citizens of the Creek Nation.

Reasons for Granting the Writ.

There is a conflict between the decision of the lower court and the decision of the United States Circuit Court of Appeals for the Tenth Circuit, in the case of *Tiger* v.

Twin State Oil Co., 48 F. (2d) 509, which involved the same question now before us—the finality of the Dawes Commission findings. In deciding the above case the Circuit Court said (*supra*, pp. 514-515):

> "In the first place, the action of the Dawes Commission in making a second allotment to the same Indian is in violation of the agreement it was administering, is beyond its power, and is void. Courts of equity have power to set aside actions of administrative boards or of inferior courts which are in excess of their jurisdiction. United States *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. Ed. 927. Again, the Supreme Court of the United States in the Wildcat and Atkins cases expressly held that determinations of the Dawes Commission were subject to attack for extrinsic fraud or mistake. It conclusively appears that John Tiger and Do-saw-cher were but two names for one individual. A determination that Do-saw-cher should remain on the rolls and be allotted land after he, under the name of Tiger, had already received his allotment, could only be brought about by fraud or gross mistake. If the Commission intended to give two allotments to one Creek, it was fraud. But of course it did not so intend. It is entirely clear that its actions were the result of a mistake; not an intrinsic mistake in the decision of disputed facts or law in a matter presented to and determined by it, as in the Wildcat and Atkins cases, but a mere clerical oversight in carrying one Indian on the rolls under two names. In the Atkins case an actual controversy was presented and determined as to the existence of Tommy Atkins; a mistake in that determination is intrinsic, and does not void the determination. But no controversy was presented or determined here, as to the existence of Do-saw-cher. He did exist. He was entitled to enrollment and allotment. But he was already enrolled, and already had his allotment under another name. The duplicate enrollment and allotment was not an intrinsic mistake in a determination, but an

extrinsic mistake in making two records of one determination. Horton v. Stegmyer (C. C. A. 8) 175 Fed. 756, 20 Ann. Cas. 1134; Luikart v. Farmers' Lumber Co. (C. C. A. 10) 38 Fed. (2d) 588. If such a mistake can not be corrected, then no power would exist to correct the error of a scrivener for the Commission who described a section, instead of a quarter-section, in an allotment deed. We cannot conclude that the government is so helpless. We therefore hold that the trial court properly corrected this manifest error, and entered a decree accordingly."

In deciding the above case the District Court of the United States for the Northern District of Oklahoma, in *Kenohah* v. *Shaffer Oil & Refining Company*, 38 F. (2d) 665, 667-668, stated:

"* * * There was no authority in law for enrolling the same member of the tribe twice, or allotting to the same member of the tribe two distinct allotments of lands of the average value. Where such has occurred, it was without authority of law. If intentionally done, it would be a fraud upon the other members of the tribe; if done through accident, error, or mistake, such mistake should be corrected under the equity power of the court."

Thus it is well settled that the Dawes Commission had no authority to enroll persons in violation of the terms of the Creek Agreements. Duplicate enrollment is one of the types of erroneous enrollments alleged in Paragraph IX of our second amended petition.

The lower court ignored the above holding of the Circuit Court of Appeals, and held that the mistakes of the Dawes Commission, a quasi-judicial body, could not be questioned in this proceeding, evidently basing its holding on the case of *United States* v. *Wildcat*, 244 U. S. 111.

In its holding we submit that the lower court overlooked not only the above decision of the Circuit Court of Appeals but also the following points:

1. That this is a proceeding under a special jurisdictional act permitting the ward to demand an accounting of its guardian for the latter's previous action, and permitting an adjudication of the ward's claims growing out of the violation of its treaties and agreements with the United States, and Acts of Congress, which proceeding would result in a money judgment only.

2. That the rights of third parties are not involved, as this suit is not for lands allotted to said erroneous enrollees. Therefore, the *Wildcat* case is not decisive to the question before us.

3. That the petitioner is entitled to its day in court.

We will discuss these points separately below.

1.

This suit was instituted under authority of a special jurisdictional act, approved May 24, 1924, c. 181, 43 Stat. 139, which reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *"

This cause of action arises under and grows out of the provisions of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, the Original Creek Agreement, ratified by Act

of March 1, 1901, c. 676, 31 Stat. 861, and the Supplemental Creek Agreement, approved by Act of June 30, 1902, c. 1323, 32 Stat. 500.

Section 21 of the Curtis Act directed defendant's officers to make "correct" rolls, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto."

The Original Creek Agreement authorized defendant's officers to allot "to each citizen one hundred and sixty acres" of Creek lands (Sec. 3), and Section 28 thereof provided in part that only such citizens entitled to enrollment under Section 21 of the Curtis Act who were living on April 1, 1899, should be enrolled on the Creek tribal rolls. Other directions for enrollment were contained in the Supplemental Creek Agreement, the Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1071, and the Act of April 26, 1906, c. 1876, 34 Stat. 137, 138. By authority of said Act of April 26, 1906, said rolls were closed as of March 4, 1907.

By the demurrer the respondent admits that it enrolled persons on the Creek tribal rolls in violation of the Creek Agreements, and thus defendant admits that the requirements of the jurisdictional act have been complied with.

Our position is that respondent is liable to petitioner for just compensation for lands lost to petitioner when respondent, the trustee, having knowledge or ample means of knowledge of many fraudulent and otherwise erroneous enrollments being made by its administrative officers in violation of the Creek Agreements, failed to use its corrective power and permitted said errors to stand until said tribal rolls became final; thus confirming said errors and giving Creek tribal lands to others not entitled thereto.

The respondent admits that the Secretary of the Interior had complete power to revise the Creek rolls before they became final under the Act of April 26, 1906 (R. 17). Under

Section 21 of the Curtis Act the Dawes Commission was given this corrective power. All of the duties and rights of this Commission were transferred to the Secretary of the Interior by Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1060, which provided in part as follows:

> "That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

The right of the Secretary to strike the names of persons erroneously enrolled was upheld by this Court in *Lowe* v. *Fisher*, 223 U. S. 95.

Respondent also admits by demurrer that it had knowledge, or ample means of knowledge, of the many errors made by its officer on the Creek tribal rolls, that it refused the offers of the Creek Nation to aid in correcting them, and the respondent did nothing or acted so arbitrarily as to prejudice the rights of petitioner to the lands erroneously allotted to said enrollees. The lower court, nevertheless, held that the action of respondent's administrative officers is now final and binding upon petitioner.

Petitioner believes that in a proceeding under the special jurisdictional act it is permitted to examine into all action of the United States, including that of all of its officers and agencies, and take a broad general view of such action in order to show the Court that respondent, the guardian of petitioner, was responsible for the loss incurred by the Creek tribal estate. The erroneous action of the Dawes Commission was merely the first step in a series of errors committed by respondent which resulted in the loss to petitioner herein complained of. We must look to the subsequent action or inaction of respondent to determine whether

or not these errors were confirmed by it. The findings of the Dawes Commission were subject to the approval or disapproval of the Secretary of the Interior, and when the Commission was abolished all of its powers and duties were transferred to the Secretary of the Interior. The question then arises as to what the Secretary did to correct these errors and thus to prevent loss to the Creek tribal estate after he had knowledge, or means of knowledge, of them. Clearly we have a right to examine into this question in this proceeding in order to determine whether or not the guardian has prejudiced the rights of petitioner to lands belonging to it, the ward.

Such inquiries into the action of the Secretary of the Interior are not novel under special jurisdictional acts. In other cases filed by Indian tribes under similar jurisdictional acts this Court has permitted recovery from the United States which involved decisions of subordinate individuals, officers, or commissions of respondent, the actions of which were approved by the Secretary of the Interior. An instance of such a recovery was in the *Creek* case, 295 U. S. 103. There the boundary line involved was located by a surveyor of the General Land Office, whose action was approved by the Secretary of the Interior, and patents to the lands involved were issued under the signature of the President. See, also, the *Shoshone* case, 299 U. S. 476, and the *Klamath* case, 304 U. S. 119.

That the administrative action of the Government in the management and control of Creek tribal property was not absolute, was decided in the *Creek* case, *supra*. In that case (295 U. S. 103, 110), the Supreme Court said:

> "• • • The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute.

> While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation'. Lane *v.* Pueblo of Santa Rosa, 249 U. S. 110, 113; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307-308."

The action of the respondent's administrative officers not being absolute, we have the right to show the Court in this proceeding that by respondent's improper action or inaction petitioner's lands were lost to it, and that they were given to others not entitled thereto.

As was said in the *Shoshone* case, 299 U. S. 476, 495:

> "* * * that the Government of the United States through the action or inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the de facto appropriation by relation as of the date of its beginning."

The respondent having knowledge of the errors made by its administrative officers, and having adequate authority and the means of correcting them, and failing to do so either through "action or inaction of its executive and legislative departments," confirmed said wrongs committed by its enrolling officers, and appropriated Creek lands thus lost to petitioner. That the respondent, as guardian of plaintiff, was required to correct said errors is well settled. In the *Creek* case, *supra,* this Court further stated:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its

guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

"We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."

We believe that the above language applies equally to the facts set forth in our petition; and the respondent, having admitted the many errors therein complained of, and its failure properly to correct them, and thus prevent loss to the estate of the ward, is now required to make just compensation for lands thus lost to petitioner through the errors committed by its own administrative officers.

The Wildcat Case.

The lower court predicated its holding upon the decision of this Court in the case of *United States* v. *Wildcat*, 244 U. S. 111. The decision of the Circuit Court of Appeals, which is in conflict with the decision of the lower court on the question now before us, points out that the *Wildcat* case held that "determinations of the Dawes Commission were subject to attack for extrinsic fraud or mistake". This is the position of petitioner on the question before us, and we submit that this *Wildcat* case is in favor of petitioner and not against it, as is suggested by the lower court. Furthermore, this is a direct attack upon the enrollments made by the Dawes Commission on the ground of mistake,

and also because of the fraud existing within the Commission itself, the facts with respect to which are set forth in the petition and admitted by the demurrer of respondent.

The *Wildcat* case was brought by the United States in the District Court of the United States for the Eastern District of Oklahoma, against Bessie Wildcat, et al., heirs of Barney Thlocco, an enrolled full-blood Creek Indian, to cancel the allotment deed covering 160 acres allotted to him, and to quiet title in the Creek Nation. An investigation made by the Secretary of the Interior had disclosed that Thlocco had died before April 1, 1899, and therefore was not entitled to enrollment under the terms of the Original Creek Agreement. The heirs of Thlocco defended on the ground that in a suit to recover the land the United States could not attack Thlocco's enrollment collaterally, the Dawes Commission being a quasi-judicial body.

This Court held in the *Wildcat* case:

1. That in a suit against an erroneous enrollee to recover land erroneously allotted to Thlocco, the determination of the Dawes Commission was subject to attack for extrinsic fraud or mistake, but that in this proceeding the United States had shown no valid reason for collaterally attacking the decision of the Dawes Commission, a quasi-judicial body, which made said enrollment (*supra*, p. 119).

2. That the United States was guilty of laches in bringing the suit, it having waited fourteen years after the mistake had been made by its officers, and the rights of third parties had become involved.

3. That the Secretary of the Interior could have corrected the error in enrolling Thlocco by proceeding *directly* against said enrollment, but that such action required notice and a hearing to the enrollee; that when the Secretary attempted to strike Thlocco's name from the rolls without a hearing and notice to the enrollee he acted arbitrarily and his action was void (*supra*, pp. 125-126).

In other words, the *Wildcat* case simply held that in a suit by the United States, the guardian of the Creek Nation, for land erroneously allotted to an erroneous enrollee, the Government could not raise the question of the right of the enrollee to enrollment on the Creek tribal roll, especially after the Government waited 14 years after it had made said erroneous enrollment; but, that the Government being a party to the former proceeding, and being the party that enrolled Thlocco, had one opportunity to proceed directly against said enrollment and strike it from the Creek roll, but that in attempting to do so it acted so arbitrarily as to violate the enrollee's constitutional rights; and that, having had one opportunity to act lawfully against said enrollment, it could not have another opportunity to present its objections to said enrollment by a collateral attack on it in a suit for the land allotted to said enrollee.

In the case at bar respondent admits that the Creek rolls were kept secret, and that petitioner was not permitted to inspect same until they became final and binding upon petitioner. Therefore, the defense of the erroneous enrollee against the Government in the *Wildcat* case—that the Government had an opportunity to correct said erroneous enrollment—would not be available to the Government in this suit by the Creek Nation, the ward, against the Government, the guardian, for errors thus committed by the latter in the management and control of the Creek tribal estate. Certainly the Creek Nation has a right to a hearing in this proceeding, and has a right to present its claim for the first time in this proceeding.

In the *Wildcat* case this Court was careful to point out the plain course the United States could have pursued to correct said erroneous enrollment. Had the respondent, through the Secretary of the Interior, proceeded directly against this enrollment, by giving the heirs of Thlocco notice and a hearing, and then stricken his name from the

Creek rolls, this action would have been as final upon the rights of Thlocco as were the findings of the Dawes Commission, and this error would have been properly corrected. No excuse can be given for the failure of respondent so to proceed. The erroneous enrollment of Thlocco was known as early as August, 1904, three years before the rolls were closed, which was ample time for the Secretary properly to investigate and correct this error. However, when the Secretary did finally act, he did so arbitrarily, and thus violated the Constitutional rights of Thlocco's heirs. As the respondent and its officers are presumed to know the law, especially fundamental Constitutional rights, to say that the Secretary was not aware of the erroneous enrollee's Constitutional rights would be no excuse for respondent's failure properly to correct this error and save the rights of petitioner in the lands thus erroneously allotted to Thlocco.

This case most effectively shows the utter disregard of respondent's clear duty to petitioner, its Indian ward, to protect the tribal property from loss. Being under a plain duty to protect the interests of its ward, the respondent acted erroneously and so tardily as to prejudice the rights of petitioner, and thus put petitioner's lands beyond respondent's power to restore them to the tribal estate. Rather than absolve respondent of the many errors committed in the management of the affairs of the Creek Nation, this decision magnifies said errors, and shows conclusively that respondent is liable for this loss caused to petitioner's estate.

Furthermore, we believe that the *Wildcat* case differs materially from the present case in that in the *Wildcat* case the interest of third party erroneous enrollees were involved; that that suit was brought to recover the land, and therein the tribal rolls were an important link in the chain of title of the heirs or assignees of the allottee. The fact

that Thlocco's name was shown on the Creek rolls was decisive of his right to the lands. In the present case the interests of third party enrollees are not involved, but the ward is suing the guardian for the violation of its agreement obligations owing to petitioner. The present suit does not depend altogether upon the erroneous action of the Dawes Commission, but upon the ultimate failure of respondent properly to protect from loss the estate of its Indian ward. The tribal rolls are but incidentally involved to show as an evidentiary fact what was done by one agency of the Government in order that it can be shown what errors were committed by respondent and what course respondent should have then taken to protect petitioner from the loss of its lands. Let us repeat, we are not now seeking to set aside the findings of the Dawes Commission, as later approved by the Secretary of the Interior, in order to recover the land in kind. We seek merely to recover a money judgment from the United States, the guardian, for the value of lands lost to the Creek Nation through errors admittedly committed by the administrative officers and agencies of respondent, the confirmation of which errors by respondent prejudiced the rights of the Creek Nation, and amounted to giving Creek tribal lands to others not justly entitled to them.

Clearly the *Wildcat* case is not decisive of the issue now before us.

The Creek Nation is Entitled to Its Day in Court.

The demurrer admits that when respondent assumed full administrative control over the property and affairs of petitioner, it required petitioner's officers to turn over to the officers of respondent its tribal rolls; that, when petitioner learned that respondent's administrative officers were enrolling persons on the Creek tribal rolls in violation of the Creek Agreements, petitioner endeavored to secure re-

spondent's permission to inspect said rolls and point out said errors in order that they could be corrected; that respondent, through its officers and agents, refused to permit petitioner to inspect said rolls, and that said rolls were kept secret and were kept from the constituted authorities of petitioner until they became final on March 4, 1907, under the Act of April 26, 1906.

The lower court's holding is in effect that when the respondent prevented petitioner from defending against the wrongs committed by respondent's administrative officers in a prior proceeding, it is now prevented from pointing out these errors in this proceeding. Thus the guardian, when properly called upon to compensate the ward from errors admittedly made by it, cites its own action as precluding petitioner's recovery. We submit that such a holding is inconsistent with every principle of equity and justice, is not sustained by law or by the recent decisions setting forth the rule governing respondent's administrative action, and that it denies to petitioner its day in court which is authorized by the present jurisdictional act.

The doctrine against collateral attack upon the findings of a judicial or quasi-judicial body is available only to parties to the proceeding or their privies. Here, the ward, the Creek Nation, admittedly was not permitted to intervene in the proceedings before the Dawes Commission or the Secretary of the Interior. This being true, the Creek Nation, as a separate entity, is not bound by the rulings of the Commission and the Secretary of the Interior.

It is stated in 15 R. C. L., p. 869 (Sec. 345) that:

> "In equity, however, the general rule is that in all proceedings affecting the trust estate, whether brought by or against third parties, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein. Hence a judgment against the trustee alone, the bene-

ficiary not being a party thereto, does not bind the latter as a general rule, and he, in an action that seeks to subject the trust estate to the satisfaction of that judgment, may contest the correctness of the judgment, and show that it is not enforceable against the trust property."

And again in 15 R. C. L., pp. 847-848 (Sec. 321), it is stated that:

> "It is a fundamental principle of the common law, founded in justice and sound policy, that no judgment or decree affecting the person or property of an individual shall be valid, unless notice, actual or constructive is given to the individual whose rights are to be affected. Every man is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision of the question. Such notice and opportunity to be heard are essential elements of due process of law, and the sentence or judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal."

As soon as the respondent's administrative officers secured the tribal rolls from the authorities of petitioner, a "veil of secrecy" was drawn over this whole enrollment work. Although the members of the Dawes Commission were strangers to the Indian Territory and had no knowledge of the customs and language of the people whose rights were affected, yet the Creek Nation was not permitted to cooperate in an effort to make this work conform to any degree of accuracy.

Very early in this enrollment work rumors were common throughout the Creek country that many persons were being enrolled upon the Creek tribal rolls in violation of the terms of the Creek Agreements; and the duly constituted

authorities of the Creek Nation demanded the right to inspect the rolls then being made and point out the errors, so that they could be corrected. However, both the Commission and the Secretary of the Interior refused plaintiff, its Principal Chief and its National Attorney, the right to inspect these rolls. At the time of these many demands and refusals, investigations had been made into conditions prevailing within the Indian Territory and within the Dawes Commission itself, which disclosed that the officers and agents of respondent, while engaged in said enrolling and allotment work, were dealing in the ward's lands (See Sen. Doc. 189, 58 Cong., 2 Sess., pp. 13-15; 22-24, 39-40).

The demurrer admits that these intolerable conditions existed within the Dawes Commission, the enrolling agency. While actually engaged in the work of enrolling and alloting Creek Indians, the Chairman and other members of the Dawes Commission personally organized their own private trust company which was chartered to deal in Indian lands; that the offices of the Dawes Commission were moved from the first floor of the building to the second floor, and the offices of this private trust company were moved into the offices vacated by the Dawes Commission, and communication between the two offices was maintained by a back spiral stairway. While the Creek rolls were kept secret from the Creek Nation and other private parties, yet these Dawes Commission officials used the information obtained therefrom to further their own personal interests through the land companies thus organized by them, and through dealings between the trust companies and the Indians the latter suffered greatly, and through indefensible business methods said company became the richest land company within the Indian territory. Thus through these land companies the said officers of respondent used the information obtained from these rolls to further their own personal interests to the detriment of the Creek Nation.

It is well settled that:

> "One of the most fundamental duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the cestui que trust. He must exclude all selfish interest and also all consideration of the welfare of third persons. This duty grows out of the fact that the trustee is a representative and out of the well-known inability of human beings to serve two masters at once or to act satisfactorily when faced with conflicting interests." (Bogert, Trusts & Trustees, par. 543, p. 1722.)

Also it is well settled that:

> "The same doctrine has been applied to a trustee who indirectly gets extra compensation for himself as a trustee, or employs the trust fund in his own business and makes a profit therefrom or gets profits from a business which competes with the trust and which he himself establishes, or accepts directors' or other officers' fees on account of a directorship obtained through ownership of the trust stock * * *" (Bogert, Trusts and Trustees, Par. 492, p. 1558).

Under such circumstances no valid reason can be advanced for respondent's refusal to permit the authorities of the Creek Nation the right to inspect these tribal rolls. If the Creek Nation had been allowed to inspect the rolls, the errors thereon could then have been corrected before the rolls became final, and the rights of the petitioner would not have been prejudiced by the allotment of lands to said erroneous enrollees. We believe that respondent should have disclosed these rolls to the petitioner and should have used every available means to protect the interests of its ward, the Creek Nation, so as to prevent loss to its tribal estate.

It is aptly stated in Freeman on Judgments (5th Ed.), Part 3, Sec. 1219, p. 2536, that:

> "* * * Where a party has, without his fault or negligence, been prevented to his prejudice, from interposing a meritorious defense, by acts or circumstances constituting grounds for equitable relief, equity may set aside the judgment to permit him to make the defense. But a complaint in equity seeking to avoid the effect of a judgment against him at law must always disclose a sufficient excuse for not making his defense in the original action. This excuse may be founded upon any of the customary grounds of equity jurisdiction, such as fraud or wrongful act of the adverse party, mistake, accident, surprise, or other circumstances making it impossible for the defense to be presented."

And again at p. 2576 (Sec. 1235), supra, it is stated that:

> "* * * The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud for which equity may afford relief from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule."

The respondent admittedly prevented the Creek Nation from making its defenses to the said erroneous enrollments, it admittedly failed to disclose these tribal rolls before they became final and binding, and admittedly the Creek Nation was not a party to any of said proceedings. Therefore, we believe that, under these admitted facts, the findings thus made by the Commission and the Secretary of the Interior would not bar the Creek Nation in this action from recovering just compensation for lands alloted to said erroneous enrollees.

Conclusion.

We summarize the points relied upon by us as follows:

1. The jurisdictional Act of May 24, 1924, confers jurisdiction on the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States * * *." It is conceded on the demurrer that this is a case arising under an agreement between the United States and the Creek Nation. This being true, the Court is given jurisdiction "to hear, examine, and adjudicate" "any and all legal and equitable claims" of the Creek Nation against the United States. The Court is thus given jurisdiction over claims of an equitable character, such as a claim for an accounting between the guardian, the United States, and the ward, the Creek Nation. This action is essentially one for such an accounting.

2. The findings of the Dawes Commission were subject to the approval of the Secretary of the Interior. In fact, all the powers and duties of the Commission were transferred by Act of Congress to the Secretary of the Interior. In many cases, the Court of Claims has permitted a recovery from the United States by Indian Tribes or Indian Nations that involved decisions of subordinate individuals or commissions, officers of the United States, approved by the Secretary of the Interior. Take, for instance, the case of *Creek Nation* v. *United States*, 295 U. S. 103. There, the boundary line involved was located by a Government officer, whose action was approved by the Secretary of the Interior. See, also, the *Shoshone* case, 299 U. S. 476, and the *Klamath* case, 304 U. S. 119.

3. The Dawes Commission and the Secretary of the Interior were the representatives of the United States, the party defendant in this proceeding. The Indian Nation is seeking to enforce its rights given it by the jurisdictional act to sue the United States on any legal or equitable cause of action. Upon the facts, this is an action by the ward against its guardian for an accounting. The guardian seeks to prevent a recovery by citing a decision or decisions of the Dawes Commission subsequently approved by the Secretary of the Interior. These officers are, for our purposes here, merely other names for the United States. The guardian, therefore, when properly called upon to compensate the ward for errors made by it, the guardian, cites its own decisions as justifying a denial of recovery. Such a contention is inconsistent with every principle of equity and justice.

4. The doctrine against the collateral attack upon the findings of a judicial or quasi-judicial body is available only to parties to the proceeding or their privies. Here, the ward, the Creek Nation, was not a party to the proceeding before the Dawes Commission or the Secretary of the Interior and, in fact, was not permitted to intervene in that proceeding for any purpose. In view of this fact, the Creek Nation is not bound by the rulings of the Commission and of the Secretary of the Interior. The reason of the rule is that a party, while entitled to his day in court, is not given two days in court to litigate the same question. This rule, however, is without application to the instant case because, unless the Creek Nation may litigate in this proceeding its right to recover on account of the wrongful acts of the respondent, it will not have had a single day in court on the question now presented for decision. In the amended petition, it is shown that the right to inspect the rolls was denied the Creek Nation by the Commission and by the Secretary of the Interior, officers of the United States.

5. The *Wildcat* case is not decisive of the question before us. In that case suit was for the land, whereas in this suit the recovery could be a money judgment only, wherein the interests of third parties are not involved.

6. That this proceeding is a direct attack upon the findings of the Dawes Commission for the mistakes made by it in enrolling Creek Indians under the terms of the Creek Agreements, and because of the intolerable conditions within the Dawes Commission itself, wherein the officers of respondent were using positions of trust to their own personal interests at the expense of the Creek Nation, through land buying companies organized by them, and in which said officers were the principal stockholders.

Respectfully submitted,

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